

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 221.

DULUTH AND IRON RANGE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

JOSEPH H. ROY.

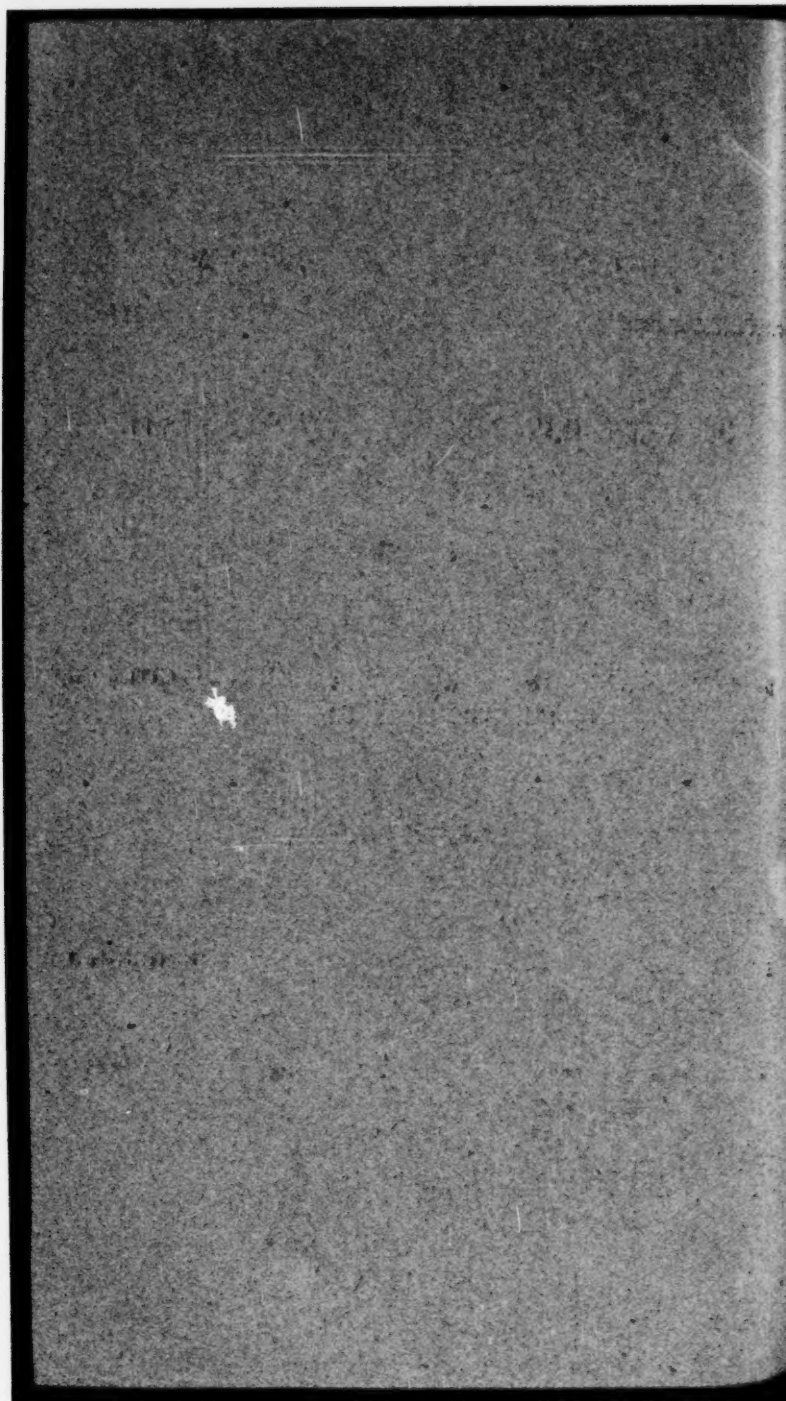
IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED DECEMBER 28, 1897.

(16,764.)

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(16,764.)

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1 STATE OF MINNESOTA, { ss :
County of St. Louis, }

Thos. J. Davis, being first duly sworn, says: I am upwards of twenty-one years of age, reside at No. 301 West Third street, in the city of Duluth, in said county, and am personally acquainted with John Jenswold, Jr., the attorney of Joseph Roy, named as defendant in error in the within and annexed citation. On the 6th day of December, 1897, I served the within citation upon the aforesaid John Jenswold, Jr., as attorney for said Joseph Roy, defendant in error, by delivering a true copy of said citation to said John Jenswold, Jr., in said city of Duluth, and at the same time I exhibited to him, said John Jenswold, Jr., the attached original citation, with the signature of the chief justice of the State of Minnesota thereon, and the signature to the admission of service indorsed upon the back of said original citation is the original signature of said John Jenswold, Jr.

THOS. J. DAVIS.

Subscribed and sworn to before me this 7th day of December, A. D. 1897.

[Notarial Seal, St. Louis Co., Minn.]

CARRIE C. NOYES,
Notary Public, St. Louis Co., Minn.

2 Citation.

The United States of America to Joseph Roy, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on the 31st day of December, 1897, pursuant to a writ of error filed in the office of the supreme court of the State of Minnesota, wherein Duluth & Iron Range Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 4th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

3 [Endorsed:] United States of America, ss: Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error. Citation. Service of the within citation, by copy, at the city of Duluth, State of Minnesota, this 6th day of December, A. D. 1897, is hereby admitted. Jno. Jenswold, Jr., attorney for Joseph Roy, defendant in error.

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph Roy, respondent, and Duluth & Iron Range Railroad Company, John Megins, and Moses D. Kenyon, appellants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Duluth & Iron Range Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

5 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 31st day of December, 1897, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal U. S. Circuit Court, Third Division, Dist. of Minnesota.]

HENRY D. LANG,

*Clerk of the Circuit Court of the United States
for the District of Minnesota.*

Allowed by—

CHAS. M. START,

*Chief Justice of the Supreme Court
of the State of Minnesota.*

[Endorsed:] Original. United States Supreme Court.
The Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error. Writ of error.

7 STATE OF MINNESOTA :

Supreme Court, October Term, 1897.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, Appellant, and
John Megins and Moses B. Kenyon, Defendants.*Assignments of Error.*

1. The facts found do not support the conclusions of law.
2. The court erred in finding as conclusion of law from the facts found, that plaintiff is the equitable owner of the land in question on this appeal, to wit, the north half of the land described in the complaint. (Paper Book, fol. 7.)
3. The court erred in finding as a conclusion of law, on the facts found, that plaintiff was entitled to judgment declaring him to be the equitable owner of the said land.
4. The court erred in ordering judgment on the facts in favor of plaintiff, for the reason,
 - a. That the legal title to the land in question, the north half of the land described in the complaint, was vested in the appellant, and there is no finding that there was any mistake of law or fraud on the part of the General Land Office of the United States or any officer of the United States.
 - b. The finding that the patent to the State of Minnesota, through which appellant acquired the legal title, was issued "through a mistake and inadvertence," does not constitute any ground for adjudging plaintiff the equitable owner of the land or entitled to judgment.
 - c. That plaintiff is not the real party in interest, and never had any legal or equitable interest in the land, the United States being the only party which could question or attack the action of the officers of the General Land Office of the United States in issuing the patent, to set it aside or to determine its effect, validity or party in whom it vested, either legal or equitable title.

9 Know all men by these presents that the Duluth & Iron Range Railroad Company, a corporation organized under the laws of the State of Minnesota, as principal, and B. P. Crane and J. L. Greatsinger, as sureties, are held and firmly bound unto Joseph Roy in the sum of five thousand dollars, to be paid to the said Joseph Roy; for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this second day of December, in the year of our Lord eighteen hundred and ninety-seven.

Whereas a judgment was entered in the supreme court of the State of Minnesota on the 16th day of November, 1897, in a suit there pending between Joseph Roy, plaintiff, and said Duluth & Iron Range Railroad Company and John Megins and Moses D.

Kenyon, defendants, in favor of said plaintiff and against said defendants, and the said Duluth & Iron Range Railroad Company having applied for a writ of error from the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and wishing said writ to be a supersedeas:

Now, therefore, the condition of this obligation is such that if the above-named Duluth & Iron Range Railroad Company shall prosecute said writ to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain of full force and virtue.

DULUTH & IRON RANGE [SEAL.]
RAILROAD COMPANY,
By J. L. GREATSINGER, *President*.
B. P. CRANE. [SEAL.]
J. L. GREATSINGER. [SEAL.]

Signed, sealed, and delivered in presence of—

THOS. J. DAVIS.
ALICE BROAD.

10 STATE OF MINNESOTA, }
County of St. Louis, } ss :

On this 2nd day of December, A. D. 1897, before me appeared J. L. Greatsinger, to me personally known, who, being by me duly sworn, did say that he is the president of Duluth & Iron Range Railroad Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was so signed and sealed in behalf of said corporation by said J. L. Greatsinger by authority of its board of directors, and said J. L. Greatsinger acknowledged the said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.]

THOS. J. DAVIS,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

On this 2nd day of December, A. D. 1897, before me, a notary public within and for said county, personally appeared B. P. Crane and J. L. Greatsinger, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.]

THOS. J. DAVIS,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

B. P. Crane and J. L. Greatsinger, being duly sworn, say, each for himself, that he is one of the sureties above named; that he is a resi-

11

B. P. CRANE.

J. L. GREATSINGER.

1897.

[NOTARIAL SEAL.]

THOS. J. DAVIS.

Notary Public, St. Louis Co., Minn.

12

[Endorsed:] Copy. State of Minnesota, supreme court.

Joseph Roy, respondent, *vs.* Duluth & Iron Range Railroad Company, John Megins, and Moses D. Kenyon, appellants. Bond on writ of error. The within bond and sureties thereon are hereby approved. Chas. M. Start, chief justice of the supreme court of the State of Minnesota. Dated December 4th, 1897. Draper, Davis & Hollister, attorneys for appellant Duluth & Iron Range R. R. Co., 400-406 First Nat'l Bank bldg., Duluth, Minn.

13

Supreme Court, October Term, 1897.

STATE OF MINNESOTA,)

St. Louis County.

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

against

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS,

Defendants.

Summons.

The State of Minnesota to the above-named defendants :

14

of Minnesota, and to serve a copy of your answer to said

complaint on the subscriber, at his office, in the city of Duluth in the said county of St. Louis, within twenty days after service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in said complaint, together with plaintiff's costs and disbursements herein.

Dated June 18th, A. D. 1894.

JNO. JENSWOLD, JR.,

Plaintiff's Attorney, No. 306 Palladio Bldg., Duluth, Minn.

STATE OF MINNESOTA, }
 County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS,
 Defendants. }

Complaint.

Plaintiff for cause of action says :

That the defendant The Duluth & Iron Range Railroad Company is now and during all the times hereinafter stated has been a corporation duly organized and created under the laws of the State of Minnesota, under which it was incorporated, and as such has been engaged in the operation of a railroad in this State.

15 That plaintiff is the owner and in possession by himself of the following-described premises situated in St. Louis county, Minnesota, to wit :

The northwest quarter (N. W. $\frac{1}{4}$) of section No. three (3) in township No. sixty-one (61), north of range No. fifteen (15), west of the 4th P. M.

That the defendants claim an estate or interest therein adverse to the plaintiff.

That this action is brought for the purpose of determining such adverse claim, estate or interest.

Wherefore, plaintiff demands that defendants set up their claim, estate or interest therein, and that the court adjudge and decree that plaintiff is the sole and absolute owner of said premises, and that the title thereto is in him, and that he have judgment against the defendants for his costs and disbursements herein and such other and further relief as to the court shall seem proper.

JNO. JENSWOLD, JR.,

Attorney for Plaintiff, 306 Palladio Bldg., Duluth, Minn.

JOHN BRENNAN,

Of Counsel for Plaintiff.

STATE OF MINNESOTA, }
 County of St. Louis, } ss :

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action ; that the within complaint is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JOSEPH ROY.

16 Subscribed and sworn to before me this 13th day of June,
 A. D. 1894.

[NOTARIAL SEAL.]

JNO. JENSWOLD, JR.,

Notary Public, St. Louis County, Minn.

Filed in my office at — o'clock — m., June 18th, 1894.

D. J. SINCLAIR,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss.

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS,
Defendants. }

Separate Answer of Duluth & Iron Range Railroad Company.

Duluth & Iron Range Railroad Company, for its separate answer to the complaint of plaintiff:

1. Denies each and every allegation in said complaint, except such as are hereinafter expressly admitted or otherwise stated.

2. This defendant admits that it is, and during all the time mentioned in the complaint has been, a corporation under the laws of the State of Minnesota, engaged in the operation of a railroad.

3. And upon information and belief, denies that plaintiff is in possession of the north half of the northwest quarter of section three, township sixty-one, north of range fifteen, west of the fourth principal meridian of the State of Minnesota; and

4. Alleges that it, said Duluth & Iron Range Railroad Company, is and at the time said action was commenced was the owner in fee-simple and entitled to the possession of, all of the above-described lands, being the north half of the lands mentioned in the complaint, and that plaintiff has no title to, interest in or lien upon the lands hereinbefore described.

Wherefore, defendant Duluth & Iron Range Railroad Company demands judgment:

1. That it is the owner in fee-simple of said north half of the northwest quarter of section three, township sixty-one, north of range fifteen, west of the fourth principal meridian; and

That plaintiff has no title to, interest in or lien upon said lands or any part thereof.

2. For the costs and disbursements of this action.

DRAPER, DAVIS & HOLLISTER,

*Attorneys for Defendant Duluth &
Iron Range Railroad Company.*

STATE OF MINNESOTA, }
County of St. Louis, } ss.

J. L. Greatsinger came before me personally, and being duly sworn doth say that he is an officer, to wit, president and general manager, of defendant Duluth & Iron Range Railroad Company in the above-

entitled action; that the foregoing separate answer is true of his own knowledge, except as to those matters therein stated on his information and belief, and, as to those matters, that he believes it to be true.

J. L. GREATSINGER.

Subscribed and sworn to before me on this 7th day of July, A. D. 1894.

[NOTARIAL SEAL.]

THOS. J. DAVIS,
Notary Public, St. Louis Co., Minn.

Due service of the within separate answer of the Duluth & Iron Range railroad by copy is hereby admitted at the city of Duluth, Minn., this 7th day of July, 1894.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

Filed in my office at — o'clock, — m., July 13th, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

The defendant herein, John Megins, for his separate answer to the complaint of the plaintiff in the above-entitled action, denies each and every allegation of said complaint not hereinafter admitted.

19 This defendant alleges:

That at the commencement of this action he was and is now the owner in fee-simple of an undivided three-quarters of that piece or parcel of land situated in the county of St. Louis and State of Minnesota, and described as follows: The south half of the north-west one-quarter of section No. three (3), in township No. sixty-one (61), north of range No. fifteen (15), west of the fourth P. M.

That the said piece or parcel of land was at the commencement of this action, and is now, vacant and unoccupied.

Wherefore, this defendant asks that the plaintiff take nothing by this action, and that this defendant be adjudged to be the owner in fee-simple of an undivided three-quarters of the said piece or parcel of land, and that the adverse claim of the plaintiff thereto be forever barred and determined, and this defendant have judgment for his costs and disbursements herein.

Dated at Duluth, June 27, 1894.

WM. B. PHELPS,
Attorney for Defendant Megins.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

John Megins being first duly sworn upon oath says that he is one of the defendants in the foregoing within-entitled action; that he has heard read the foregoing answer, that the same is true to his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

JOHN MEGINS.

20 Subscribed and sworn to before me this 29th day of June, 1894.

[NOTARIAL SEAL.]

WM. B. PHELPS,
Notary Public, St. Louis Co., Minn.

Due service of the within answer, by copy, is hereby admitted at Duluth, Minn., this 7th day of July, 1894.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

Filed in my office at — o'clock, — m., October 3, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By F. R. MILLAR, Deputy.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Reply to the Answer of Duluth & Iron Range Railroad Company.

Comes now the plaintiff and for reply to the answer of Duluth & Iron Range Railroad Company says :

21 He denies each and every statement and allegation therein contained and each and every part thereof, whether as therein alleged or otherwise, except such as is specifically admitted and so pleaded in the complaint herein.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff, No. 306 Palladio Bldg., Duluth, Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters, that he believes it to be true.

Subscribed and sworn to before me this 18th day of July, A. D. 1894.

[SEAL.]

JNO. JENSWOLD, JR.,
Notary Public, St. Louis County, Minn.

Due service of the within reply, by receipt of copy thereof, at Duluth, Minnesota, is hereby admitted this 18th day of July, 1894.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Def't D. & I. R. R. Co.

Filed in my office, at — o'clock — m., Oct. 3, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By F. R. MILLAR, Deputy.

22 STATE OF MINNESOTA, } ss:
County of St. Louis, }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,
vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants.

Reply.

Comes now the plaintiff and for reply to the answer of John Megins says:

He denies each and every statement and allegation therein contained and each and every part thereof, whether as therein alleged or otherwise, except such as is specifically admitted and so pleaded in the complaint herein.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff, No. 306 Palladian Bldg., Duluth, Minn.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters, that he believes it to be true.

Subscribed and sworn to before me this — day of July, A. D. 1894.

[SEAL.]

Notary Public, St. Louis County, Minn.

23 Due service of the within reply, by receipt of copy thereof, at Duluth, Minnesota, is hereby admitted this 18th day of July, 1894.

WM. B. PHELPS,
Attorney for Def't Megins.

Filed in my office at — o'clock, — m., Oct. 3, 1894.

D. J. SINCLAIR,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Motion.

Comes now the above-named plaintiff and moves the court for an order that he be granted permission to serve and file the attached amended reply herein.

This motion is based upon the following affidavits, which are made a part hereof.

JNO. JENSWOLD, Jr.,

JOHN BRENNAN,

Attorneys for Plaintiff.

24 *Affidavit of Merits.*

STATE OF MINNESOTA, }
County of St. Louis, } ss :

Joseph Roy, being duly sworn, upon oath says: That he is the plaintiff in the above entitled action; that he has fully and fairly stated the case and facts in the case to his counsel; that he has a good and substantial defense to the defendants' claim of ownership and title, on the merits, and also has a substantial cause of action on the merits, as he is advised by his counsel after such statement and verily believes true; that the names and places of residence of such counsel are John Brennan, West Superior, Wisconsin, and John Jenswold, Jr., Duluth, Minnesota; that the attached is the proposed amended reply which he seeks to have allowed and filed herein

JOSEPH ROY.

Subscribed and sworn to before me this 4th day of October, 1894.

JNO. JENSWOLD, JR.,

Notary Public, St. Louis Co.

[NOTARIAL SEAL.]

STATE OF MINNESOTA, }
County of St. Louis, } ss :

John Jenswold, Jr., and John Brennan, being each duly sworn, each for himself deposes and says: That he is the attorney and counsel of the plaintiff in the above-entitled case, and that from a

statement of the case in this action made to the deponents by the plaintiff, and from the official records and certified copies
25 of records, deponents verily believe that plaintiff has a good and substantial defense on the merits to the causes of action set forth in the answers of the defendants, and that plaintiff has a good and substantial cause of action on the merits.

That the reason why this application for leave to file an amended reply was not sooner made, and the facts therein set forth inserted in the original reply, was that the plaintiff had employed and retained as his attorney to prosecute this action the said John Brennan, who is a duly licensed and practicing attorney of the State of Wisconsin, residing at West Superior in said State; that a few days prior to the commencement of this action the said Brennan procured said Jenswold to appear as the attorney of record and to institute this action.

That at said time the said Jenswold was informed, in a general way, that plaintiff desired to commence an action to determine the adverse claims of title to the lands in controversy, and that an equitable action should be brought to determine the claims of the defendants; that said Jenswold did then and there state that by bringing an action under the statute to determine the adverse claims and alleging possession, all claims of title whether legal or equitable could be determined therein; that said Brennan relied upon said advice so given and instructed him to commence said action accordingly.

That said Jenswold did thereupon draw the complaint herein, commence this action and draw and serve the original reply, and cause the same to be filed herein without knowing anything further about the facts set forth in the proposed amended reply than said
26 general statement as aforesaid made to him by said Brennan, and that plaintiff was in possession of said land and that the same was not swamp land, and that he claimed to be the owner by virtue of certain proceedings theretofore had in the Land Department at Washington, the nature and character of which he was ignorant.

That said Jenswold relied upon said Brennan to try said cause and to procure the necessary evidence, and did for that reason make no inquiries in reference thereto. Affiant Brennan further deposes and says that he relied upon said Jenswold preparing the pleadings and selecting the proper form of action in this matter as aforesaid to determine the title to said land, and not until on the 3d day of October, 1894, did he see the original reply herein, but he did at all times prior thereto believe that a sufficient and proper reply had been made upon which all issues could be tried, the same as if an equitable action had been brought, and all the facts of the case set forth; that he was ignorant of the rules of pleadings and practice of the State of Minnesota, and relied solely upon said Jenswold having properly drawn the pleadings in said action, and for these reasons he did not cause the same to be investigated; that on said October 3, 1894, said Jenswold in consultation with said Brennan was informed of the nature and character of the evidence, whereupon said

Brennan expressed doubts about the sufficiency of the reply to admit said evidence, and thereupon these affiants concluded that it was necessary to make and serve the proposed amended reply which was accordingly prepared, but was not completed within time to serve the same upon defendants' counsel until this morning.

27 That unless this proposed amended reply is allowed, affiants verily believe that it will result in injustice to the said client, this plaintiff, and that he will not be able under the rules of evidence to properly present all the necessary and material facts bearing upon the case, and by reason thereof, that great injustice will be done and the plaintiff's title and rights to said property imperilled.

That further affiants sayeth not, except that they make this affidavit and application for the purpose of being permitted to file this their amended reply.

JNO. JENSWOLD, JR.
JOHN BRENNAN.

Subscribed and sworn to before me this 4th day of October, 1894.

HENRY S. MAHON,

[NOTARIAL SEAL.]

Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN ME-
gins, Defendants. }

Amended and Substituted Reply.

Plaintiff above named, replying to the answer of the Duluth & Iron Range Railroad Company herein, respectfully shows to the court and alleges :

28

I.

He denies each and every allegation in said answer contained.

II.

Plaintiff further alleges, that on or about the 26th day of May, 1883, the plaintiff being then and there qualified to enter the land mentioned and described in the complaint herein, as a homestead under the laws of the United States, and with the intention of entering the same as a homestead, made settlement thereon, and immediately thereafter established his residence on said land, and has ever since resided and now resides thereon, and during all of said time has been, and now is, in the actual, exclusive and notorious possession of the same. That when the plaintiff commenced his residence on said land, the plat of the township in which said lands

were situated had not been filed in the land office at Duluth, that being the land office of the district in which said land was situated, and on account thereof he was unable to enter said land. That on or about the 2nd day of July, 1883, after the plat of the survey of said township was filed in said land office, the plaintiff went thereto with the intention of entering said land as a homestead, and presented his application to make homestead entry thereof, which was refused, and was then and there informed by the land officers of said land office that there had been a mistake made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests

29 then filed in said office against said survey, and that these were sufficient to raise the question as to the accuracy of said survey, and that it would be unnecessary for the plaintiff to protest or object to said survey, and for him to wait until the protests already made against the same be determined. That the plaintiff relied upon the representations so made by said officers, and for that reason did not at said time appeal from the rejection of his said application to enter said land, but returned to live thereon. That at said time he did not thoroughly understand the English language, being a foreigner by birth, was unfamiliar and unacquainted with the laws, rules, and regulations relating to the disposition of the public lands, and relied upon what said land officers told him as aforesaid. That on the 5th day of August, 1884, the plaintiff having discovered that said lands were claimed by the State of Minnesota as swamp lands, duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making said entry; that at said time no adverse claim had arisen in reference to said land, or was filed in said office; that the said local land officers unlawfully rejected the plaintiff's said application to enter said land on the ground that said land enured to the State of Minnesota under the act of March 12th, 1860, and that his application to enter said land was not made within three months after the filing of the township plat in said office. That on the 6th day of August, 1884, the plaintiff duly filed in said local land office his affidavit, duly corroborated by two witnesses, setting forth that said land

30 was not swamp land or wet and unfit for cultivation, but that the same was all, with the exception of four or five acres, in the northwest quarter thereof, high, dry and fit for cultivation; and founded on said affidavit corroborated as aforesaid on the 26th day of August, 1884, duly appealed from the rejection of said application to enter said land as a homestead by the said local land officers, unto the Commissioner of the General Land Office, which appeal with said affidavit was, by said local land officers, on the 26th day of August, 1884, duly transmitted to the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said land as a homestead, and his said contest of the claim of the State of Minne-

sota to said lands as swamp lands, was pending and undetermined in the General Land Office, through inadvertence and mistake, they were overlooked, and the lands inadvertently and through mistake unlawfully patented to the State of Minnesota.

That the plaintiff by his settlement, improvements and residence upon said land, and his said application to enter the same as a homestead, and his appeal from the rejection thereof, and his said contest of the claim of the State of Minnesota thereto, acquired a right to be preferred in the acquisition of said land from the United States, and by virtue thereof and of the premises became, was and now is the equitable owner thereof. That by said patent to the State of Minnesota, the apparent legal title to said
31 lands unlawfully passed thereto, when in equity the plaintiff was and is entitled to said lands. That the defendant The Duluth & Iron Range Railroad Company claims title to lands by virtue of an alleged grant of said lands by said State. That it took said conveyances of said land with actual notice of the plaintiff's rights thereto and with knowledge that the plaintiff was in possession of said lands, and claimed title thereto. That by said patent of said lands by the United States to the State of Minnesota, and said grant by the State of Minnesota to the Duluth & Iron Range Railroad Company, no valid title whatever to said lands passed into said State or unto said railroad company.

III.

That the lands at the time of the swamp-land act of September 28, 1850, was extended to the State of Minnesota, to wit, on March 12, 1860, were not, never since have been, nor now are, swamp or overflowed or unfit for cultivation; but on the contrary high, dry, and fit for cultivation, all of which the defendant The Duluth & Iron Range Railroad Company had notice when it took a conveyance of said lands.

Wherefore plaintiff demands judgment as prayed for in the complaint herein.

JNO. JENSWOLD, JR., AND
JNO. BRENNAN,

Attorneys for Plaintiff, 306 Palladio Bldg., Duluth, Minn.

32 STATE OF MINNESOTA, }
County of St. Louis, } ss:

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JOSEPH ROY.

Subscribed and sworn to before me this 3d day of October, A. D. 1894.

JNO. JENSWOLD, JR.,
[NOTARIAL SEAL.] Notary Public, St. Louis County, Minn.

Due service of the within notice and reply, by receipt of copy thereof, Duluth, Minnesota, is hereby admitted this 4th day of October, 1894.

Attorney for Defendant Duluth & I. R. R. Co.

Filed in my office at — o'clock, — m., October 4, 1894.

D. J. SINCLAIR,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

33 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Motion.

Comes now the above-named plaintiff and moves the court for an order that he be granted permission to serve and file the attached amended reply herein.

This motion is based upon the following affidavits, which are made a part hereof.

JNO. JENSWOLD, JR.,

JOHN BRENNAN,

Attorneys for Plaintiff.

Affidavit of Merits.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

Joseph Roy, being duly sworn, upon oath says: That he is the plaintiff in the above-entitled action; that he has fully and fairly stated the case and facts in the case to his counsel; that he has a good and substantial defense to the defendants' claim of ownership and title, on the merits, and also has a substantial cause of action on the merits, as he is advised by his counsel after such statement and verily believes true; that the names and places of residence of such counsel are John Brennan, West Superior, Wisconsin, and

34 John Jenswold, Jr., Duluth, Minnesota; that the attached is the proposed amended reply which he seeks to have allowed and filed herein.

JOSEPH ROY.

Subscribed and sworn to before me this 4th day of October, 1894.

JNO. JENSWOLD, JR.,

[NOTARIAL SEAL.]

Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, }
 County of St. Louis, } ss :

John Jenswold, Jr., and John Brennan, being each duly sworn, each for himself deposes and says: That he is the attorney and counsel of the plaintiff in the above entitled case, and that from a statement of the case in this action made to the deponents by the plaintiff, and from the official records and certified copies of records, deponents verily believe that plaintiff has a good and substantial defense on the merits to the causes of action set forth in the answers of the defendants, and that plaintiff has a good and substantial cause of action on the merits.

That the reason why this application for leave to file an amended reply was not sooner made, and the facts therein set forth inserted in the original reply, was that the plaintiff had employed and retained as his attorney to prosecute this action the said John Brennan, who is a duly licensed and practicing attorney of the State of Wisconsin, residing at West Superior, in said State; that a few days prior to the commencement of this action the said Brennan procured said Jenswold to appear as the attorney of record and to institute this action.

That at said time the said Jenswold was informed, in a general way, that plaintiff desired to commence an action to determine the adverse claims of title to the lands in controversy, and that an equitable action should be brought to determine the claims of the defendants; that said Jenswold did then and there state that by bringing an action under the statute to determine the adverse claims and alleging possession, all claims of title whether legal or equitable could be determined therein; that said Brennan relied upon said advice so given and instructed him to commence said action accordingly.

That said Jenswold did thereupon draw the complaint herein, commence this action and draw and serve the original reply, and cause the same to be filed herein without knowing anything further about the facts set forth in the proposed amended reply than said general statement as aforesaid made to him by said Brennan, and that plaintiff was in possession of said land and that the same was not swamp lands, and that he claimed to be the owner by virtue of certain proceedings theretofore had in the Land Department at Washington, the nature and character of which he was ignorant.

That said Jenswold relied upon said Brennan to try said cause and to procure the necessary evidence, and did for that reason make no inquiries in reference thereto. Affiant Brennan further deposes and says that he relied upon said Jenswold preparing the pleadings and selecting the proper form of action in this matter as aforesaid to determine the title to said land, and not until on the 3d day of October, 1894, did he see the original reply herein, but he did at all times prior thereto believe that a sufficient and proper reply had been made upon which all issues could be tried,

the same as if an equitable action had been brought, and all

the facts of the case set forth; that he was ignorant of the rules of pleadings and practice of the State of Minnesota, and relied solely upon said Jenswold having properly drawn the pleadings in said action, and for these reasons he did not cause the same to be investigated; that on said October 3, 1894, said Jenswold in consultation with said Brennan was informed of the nature and character of the evidence, whereupon said Brennan expressed doubts about the sufficiency of the reply to admit said evidence, and thereupon these affiants concluded that it was necessary to make and serve the proposed amended reply which was accordingly prepared, but was not completed within time to serve the same upon defendants' counsel until this morning.

That unless this proposed amended reply is allowed, affiants verily believe that it will result in injustice to the said client, this plaintiff, and that he will not be able under the rules of evidence to properly present all the necessary and material facts bearing upon the case, and by reason thereof, that great injustice will be done and the plaintiff's title and rights to said property imperilled.

That further affiants sayeth not, except that they make this affidavit and application for the purpose of being permitted to file this their amended reply.

JNO. JENSWOLD, JR.
JOHN BRENNAN.

Subscribed and sworn to before me this 4th day of October, 1894.

HENRY S. MAHON,
[NOTARIAL SEAL.] *Notary Public, St. Louis Co., Minn.*

37 STATE OF MINNESOTA, }
County of St. Louis, } ss:

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff, }
vs. }
DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Amended and Substituted Reply.

Plaintiff above named, replying to the answer of John Megins herein, respectfully shows to the court and alleges:

I.

He denies each and every allegation in said answer contained.

II.

Plaintiff further alleges, that on or about the 26th day of May, 1883, the plaintiff being then and there qualified to enter the land mentioned and described in the complaint herein, as a homestead under the laws of the United States, and with the intention of enter-

ing the same as a homestead, made settlement thereon, and immediately thereafter established his residence on said land, and has ever since resided and now resides thereon, and during all of said time has been, and now is, in the actual, exclusive and notorious possession of the same. That when the plaintiff commenced his residence on said land, the plat of the township in which said lands were situated had not been filed in the land office at Duluth, that being the land office of the district in which said land was situated, and

on account thereof he was unable to enter said land. That on 38 or about the 2nd day of July, 1883, after the plat of the survey of said township was filed in said land office, the plaintiff went thereto with the intention of entering said land as a homestead, and presented his application to make homestead entry thereof, which was refused, and was then and there informed by the land officers of said land office that there had been a mistake made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests then filed in said office against said survey, and that these were sufficient to raise the question as to the accuracy of said survey, and that it would be unnecessary for the plaintiff to protest or object to said survey, and for him to wait until the protests already made against the same be determined. That the plaintiff relied upon the representations so made by said officers, and for that reason did not at said time appeal from the rejection of his said application to enter said land, but returned to live thereon. That at said time he did not thoroughly understand the English language, being a foreigner by birth, was unfamiliar and unacquainted with the laws, rules and regulations relating to the disposition of the public lands, and relied upon what said land officers told him as aforesaid. That on the 5th day of August, 1884, the plaintiff having discovered that said lands were claimed by the State of Minnesota as swamp lands, duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making said entry; that at said time no adverse claim had arisen in reference to said land, or was filed in said office;

39 that the said local land officers unlawfully rejected the plaintiff's said application to enter said land, on the ground that said land enured to the State of Minnesota under the act of March 12th, 1860, and that his application to enter said land was not made within three months after the filing of the township plat in said office. That on the 6th day of August, 1884, the plaintiff duly filed in said local land office his affidavit, duly corroborated by two witnesses, setting forth that said land was not swamp land or wet and unfit for cultivation, but that the same was all, with the exception of four or five acres, in the northwest quarter thereof, high, dry and fit for cultivation; and founded on said affidavit corroborated as aforesaid on the 26th day of August, 1884, duly appealed from the rejection of said application to enter said land as a homestead by the said local land officers, unto the Commissioner of the General Land Office, which appeal with said affidavit was, by said local land officers, on the 26th day of August, 1884, duly transmitted to

the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said lands as a homestead, and his said contest of the claim of the State of Minnesota to said lands as swamp lands, was pending and undetermined in the General Land Office, through inadvertence and mistake, they were overlooked, and the lands inadvertently and through mistake unlawfully patented to the State of Minnesota.

40 That the plaintiff by his settlement, improvements and residence upon said land, and his said application to enter the same as a homestead, and his appeal from the rejection thereof, and his said contest of the claim of the State of Minnesota thereto, acquired a right to be preferred in the acquisition of said land from the United States, and by virtue thereof and of the premises became, was and now is the equitable owner thereof. That by said patent to the State of Minnesota, the apparent legal title to said lands unlawfully passed thereto, when in equity the plaintiff was and is entitled to said lands. That the defendant John Megins claims title to said lands by virtue of an alleged grant of said lands by said State, made by act of March 8th, 1861, and by mesne conveyances from grantees of said State unto him. That he took said conveyances of said land with actual notice of the plaintiff's rights thereto and with knowledge that the plaintiff was in possession of said lands and claimed title thereto. That by said patent of said lands by the United States to the State of Minnesota, and said grant by the State of Minnesota to the railroad company, and the said mesne conveyances unto the said John Megins, no valid title whatever to said lands passed unto said State, its grantee or the said John Megins.

III.

That the lands at the time the swamp-land act of September 28, 1850, was extended to the State of Minnesota, to wit, on March 12, 1860, were not, never since have been, nor now are, swamp or over-
 41 dry, and fit for cultivation; but on the contrary high,
 Megins had notice when he took a conveyance of said lands.

Wherefore, plaintiff demands judgment as prayed for in the complaint herein.

JNO. JENSWOLD, JR., AND
 JNO. BRENNAN,

Attorneys for Plaintiff, 306 Palladio Bldg., Duluth, Minn.

STATE OF MINNESOTA,)
 County of St. Louis, } ss :

Joseph Roy came before me personally, and being duly sworn doth say that he is the plaintiff in the above-entitled action; that the within reply is true of his own knowledge, except as to those

matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JOSEPH ROY.

Subscribed and sworn to before me this 3d day of October, A. D. 1894.

[NOTARIAL SEAL.] JNO. JENSWOLD, JR.,
Notary Public, St. Louis County, Minn.

Due service of the within reply, by receipt of copy thereof, Duluth, Minnesota, is hereby admitted this 4th day of October, 1894.

Attorney for Defendant John Megins.

Filed in my office at — o'clock, — m., October 4, 1894.

D. J. SINCLAIR,
Clerk of District Court,
By W. A. KENNEDY, Deputy.

42 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,
vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS,
Defendants. }

The defendant herein, John Megins, demurs to the new matter contained in the amended reply of the plaintiff in this cause, and to all that part of said amended reply consisting of new matter, and for ground of objection thereto specified that the said new matter, and all that part of said reply containing new matter, does not state facts sufficient to constitute a defense to the new matter alleged in the answer of this defendant.

Dated at Duluth, October 4, 1894.

WM. B. PHELPS,
Attorney for Defendant Megins.

Due service of the within demurrer by copy is hereby admitted at Duluth, Minn., this 4th day of October, 1894.

J. JENSWOLD, JR.,
Attorney for Defendant Megins.

Filed in my office at — o'clock — m., February 11, 1897.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, Deputy.

43 STATE OF MINNESOTA, {
County of St. Louis. }

In the District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

versus

DULUTH & IRON RANGE R. R. CO. and JOHN MEGGINS, Defendants. }

Order.

The above-entitled matter coming on to be heard before the court upon the demurrer of the defendant John Meggins to the new matter contained in the amended reply of the plaintiff, W. B. Phelps, Esq., appearing as counsel for said defendant, John Jenswold, Esq., and John Brennan, Esq., appearing as counsel for the plaintiff, said matter having been fully argued and submitted, it is

Ordered, that the said demurrer be and the same hereby is overruled.

Dated this 5th day of February, A. D. 1895.

By the court:

CHAS. L. LEWIS, *Judge.*

Filed in my office at — o'clock, — m., February 9, 1895.

JOHN OWENS,

Clerk of District Court,

By W. A. KENNEDY, *Deputy.*

44 STATE OF MINNESOTA, {
County of St. Louis, } ss:

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, Defendants. }

Motion for Order Bringing in Additional Parties Defendants, etc.

Comes now the above-named plaintiff and moves the court for an order requiring Moses D. Kenyon to appear and answer the complaint in this action, and that all further proceedings herein be stayed for such time as may be necessary to enable the plaintiff to have the said Kenyon brought into court to defend therein.

As grounds for the said motion the plaintiff refers to the pleadings on file herein and the attached affidavit, and makes the same a part hereof.

Plaintiff further alleges that it is necessary in order to have a full and just determination of this action that the said Moses D. Kenyon be made a party defendant herein.

JNO. JENSWOLD, JR.,

Attorney for Plaintiff, No. 306 Palladio Bldg. Duluth, Minn.

Affidavit.

STATE OF MINNESOTA, {
 County of St. Louis, } ss :

John Jenswold, Jr., being duly sworn, upon oath says that he is the attorney for plaintiff herein; that John Brennan, Esq., a
 45 non-resident attorney residing in the State of Wisconsin, is of counsel for plaintiff herein; that affiant prepared the complaint and summons and caused the same to be served and filed and this action to be commenced; that this action is still pending, and is now upon the calendar of the regular May, 1895, term of this court for trial; that this affiant upon commencing this action had no knowledge, notice or information that any other person than the defendants The Duluth & Iron Range Railroad Company and John Megins claimed any title or interest in any part of the land in controversy adverse to this plaintiff; that the defendant railroad company served and filed its answer claiming ownership in the north half of the northwest quarter of section three (3), township sixty-one (61), range fifteen (15), being a part of the land in controversy, and the defendant John Megins filed his answer and counter-claim against this plaintiff wherein he claimed to be the sole owner of the balance of the said lands in controversy, to wit, of the south half thereof; that accordingly this case was noticed for trial for the present term of this court, and thereafter on the 27th day of April, 1895, the deposition of the defendant Megins was, pursuant to a stipulation between these parties, taken, in which said deposition said Megins gave evidence and testified that he claimed the ownership of only an undivided three-fourths ($\frac{3}{4}$) of the said south-half of the lands in controversy, and that one Moses D. Kenyon claimed ownership in and to the other undivided one-fourth ($\frac{1}{4}$) of the said south half of said land in controversy; that said Kenyon is a resident of St. Paul, Minnesota; that the testimony necessary to sustain this action on
 46 behalf of the plaintiff is and will be the same as against each of the defendants herein and the said Kenyon, and the evidence and testimony of the said Kenyon to sustain his claim of title is and will be the same as that of his codefendant Megins and that of the defendant railroad company; that said Kenyon and these defendants all claim title to said lands through a swamp-land grant, whereas plaintiff claims title thereto by a separate chain, adverse and inconsistent with said swamp-land grant; that in order to have a full and just determination of this action, it is necessary that the said Kenyon be made a party defendant herein; that this affiant did not discover the extent of the claims of the defendant Megins to be less than the entire south half of the land in controversy, and he did not know that the said Kenyon claimed to be the owner of any interest in said land until the deposition of the said Megins had been taken; that this motion and affidavit is not made for delay, but is made in good faith and that the ends of justice may be served and the motion applied for granted.

JNO. JENSWOLD, JR.

Subscribed and sworn to before me this 3d day of May, A. D. 1895.

[NOTARIAL SEAL.] WM. R. SPENCER,
Notary Public, St. Louis Co., Minn.

Notice.

To the above-named defendants :

Please take notice : That the plaintiff will on May 6, 1895,
47 at 9.30 a. m., present the above and foregoing motion to one
of the judges of the above-entitled court, at the court-house
in the city of Duluth, Minnesota.

Dated May 2, 1895.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

Due service of the within notice, etc., by receipt of copy thereof,
Duluth, Minnesota, is hereby admitted this 3d day of May, 1895.

WM. B. PHELPS,
Attorney for Defendant Megins.
DRAPER, DAVIS & HOLLISTER,
Attorneys for Def't Railroad Co.

Filed in my office at — o'clock — m., May 6, 1895.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, *Deputy.*

STATE OF MINNESOTA, }
County of Ramsey, } ss :

Emanuel Johnson being first duly sworn, deposes and says that
at the city of St. Paul, county and State aforesaid, on the 7th day
of May, 1895, he served the attached order on the within-named
Moses D. Kenyon personally, by handing to and leaving with said
Moses D. Kenyon a true and correct copy thereof, and that at the
same time and place he exhibited to said Moses D. Kenyon, so that
he could see and read the same, the original signature of Honorable
Chas. L. Lewis, judge of the district court of St. Louis county, Min-
nesota, to said original.

EMANUEL JOHNSON.

48 Subscribed and sworn to before me this 7th day of May,
1895.

[NOTARIAL SEAL.] GEO. H. IRISH,
Notary Public, Ramsey County, Minn.

Fees \$1.20.

STATE OF MINNESOTA, }
County of St. Louis, } ss:

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS, }
Defendants. }

Order.

Whereas, in the above-entitled action the plaintiff has moved for an order that Moses D. Kenyon be made a party defendant therein, in order that a full and just determination of said action might be had; and,

Whereas, a summons in said action, by which the same was commenced, was dated June 18th, 1894, and was duly served upon the above-named defendants on the same day, which said summons was in due and legal form, as required by statute, and required the defendants to answer the same within twenty days after date of such service, and in case of failure thereof that plaintiff would apply to the court for the relief demanded in his complaint which was then filed in said court

Now therefore, the court being fully advised in the premises, it is hereby

49 Ordered that Moses D. Kenyon be and he is hereby required to appear and answer the complaint in said summons named within twenty days after the service of this order upon him, exclusive of the day of such service, and in default thereof, the judgment and relief demanded in said complaint will be rendered against him in all respects as though the said Kenyon had been made a party to said action in the first instance.

It is further ordered that this order be forthwith served upon the said Kenyon in the manner required by law for the service of the summons in civil actions.

It is further ordered that all further proceedings in the above-entitled action be and the same is hereby stayed for the period of twenty-one days after the said Kenyon shall have been served with notice of this order in manner as provided by law; provided, however, that said stay shall at all events expire upon the serving by the said Kenyon of his answer herein in manner required by law.

Dated May 6, 1895.

By the court:

CHAS. L. LEWIS, *Judge.*

Received May 7, 1895.

CHAS. E. CHAPES, *Sheriff,*
By GEO. H. IRISH, *Deputy.*

Filed in my office at — o'clock — m., May 14, 1895.

JOHN OWENS,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

50 STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY and JOHN MEGINS }
and M. D. Kenyon, Defendants. }

The defendant herein, M. D. Kenyon, for his separate answer to the complaint of the plaintiff in the above-entitled action, denies each and every allegation of said complaint not hereinafter admitted.

This defendant alleges:

That at the commencement of this action he was and is now the owner in fee-simple of an undivided one-quarter interest in that piece or parcel of land situated in the county of St. Louis and State of Minnesota and described as follows: The south half (S. $\frac{1}{2}$) of northwest quarter (N. W. $\frac{1}{4}$) of section three (3) in township sixty-one (61) north of range fifteen (15), west of 4th P. M.

That said piece or parcel of land was at the commencement of this action and is now vacant and unoccupied.

Wherefore, this defendant asks that plaintiff take nothing by this action, and that this defendant be adjudged to be the owner in fee-simple of an undivided one quarter interest in said piece or parcel of land, and that the adverse claim of the plaintiff thereto be forever barred and determined, and this defendant have judgment for his costs and disbursements herein.

Dated at Duluth, Minn., May 27th, 1895.

WM. B. PHELPS,
Attorney for Defendant Kenyon.

51 STATE OF MINNESOTA, }
County of St. Louis, } ss:

Wm. B. Phelps, being first duly sworn, upon oath says that he is the attorney for defendant Kenyon in the foregoing within-entitled action; that he has heard read the foregoing answer, that the same is true to his best knowledge, information and belief, and he believes it to be true; that the reason this verification is not made by said defendant is that he is absent from the county of St. Louis, where resides affiant, his said attorney.

WM. B. PHELPS.

Subscribed and sworn to before me this 27th day of May, 1895.

[SEAL.] THOS. J. McKEON,
Notary Public, St. Louis County, Minn.

Filed in my office at — o'clock, — m., September 25, 1895.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, *Deputy.*

52 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff herein and the defendant Kenyon, that the reply to the answer of the defendant Megins, heretofore served and filed in this case, be and the same stand to and be considered as the reply to the answer of the defendant Kenyon as fully to all effects and purposes as if a separate reply was made and served upon him.

Dated Duluth, Minn., May 31, 1895.

JNO. JENSWOLD, Jr.,

Attorney for Plaintiff.

WM. B. PHELPS,

Attorney for Defendant.

Filed in my office at — o'clock, — m., June 14, 1895.

JOHN OWENS,

Clerk of District Court,

By F. R. MILLAR, *Deputy.*

53 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

Findings of Facts and Conclusions of Law.

The above-entitled action having been tried before the undersigned, one of the judges of the above-entitled court, at the regular May A. D. 1895 term thereof, the parties thereto having submitted all their proofs and made their arguments by their respective counsel and finally submitted the same, and the court being fully advised in the premises, I hereby make and find the following as my

Findings of Facts.

1st. That on or about the 26th day of May, A. D. 1883, the plaintiff was duly qualified to enter Government lands under the homestead and pre-emption laws of the United States, and on the 9th day of June, 1888, he duly became a full naturalized citizen of the United States.

2d. That on or about said May 26, 1883, the plaintiff did in good faith, and with the *bona fide* intention of acquiring title thereto, make settlement upon the following lands within St. Louis county,

54 Minnesota, to wit: The northwest quarter (N. W. ¼) of section number three (3), in township sixty-one (61), north of range number fifteen (15), west of the fourth P. M.

3d. That on the aforesaid date the plaintiff did in good faith, and with the *bona fide* intention to acquire title to the aforesaid land, establish his residence upon and he has ever since continued to be and remain in the actual, exclusive and notorious possession thereof, during all of which time he has cultivated and improved the same and maintained his home upon said premises.

4th. That said lands were at all times located within the district whereof the United States local land office was in the city of Duluth, Minnesota, and at the time when the plaintiff commenced his residence upon said land, the plat of the township in which the same was located had not been filed in said local land office, by reason of which the plaintiff was unable to file on said lands.

5th. That subsequent to said settlement the said plat of the survey of said township was filed in said local land office, and thereupon and subsequent thereto, to wit, on July 2d, 1883, the plaintiff went to said land office with the intention of entering the said land as a homestead under the laws of the United States, and he did then and there request the officers in said land office that he be allowed to make such entry; that said land officers did then and there inform him that a mistake had been made in the survey of said land, and that in all probability a resurvey thereof would be ordered; that there were numerous protests against said survey on file in the said office, which protests were sufficient to raise the question
55 as to the accuracy of the same; that it was unnecessary for plaintiff to protest or object to said survey, or to file on said land, and they thereupon advised him to wait until the said protests which were there on file should be determined.

6th. That plaintiff was a foreigner by birth and at said time did not understand the English language, and was not familiar nor acquainted with any of the laws, rules and regulations relating to the disposition of the public lands, but relied upon the representations so made by said officers, and acted upon the advice so given him, and returned to continue his occupancy and improvement of said lands.

7th. That on the 5th day of August, 1884, the plaintiff discovered that said lands were claimed by the State of Minnesota as swamp lands, and thereupon on said date he duly made application to enter the same as a homestead under the laws of the United States, and tendered the said local land officers the fees for making such entry. That at said time no adverse claim, other than the pretended claim of the State of Minnesota to said lands as swamp lands, had arisen or was made in reference thereto or filed in said land office.

8th. That the said local land officers rejected plaintiff's said application to enter said lands, on the ground that the same inured to the State of Minnesota under the act of March 12th, 1860, and

that his application to enter said lands was not made within three months after the filing of the township plat in said office.

9th. That on the 6th day of August, 1884, the plaintiff
56 duly filed in said local land office his affidavits of contest against said claim of the State of Minnesota to said land, duly corroborated by two witnesses, setting forth that said land was not swamp or overflowed land and unfit for cultivation, but that the same was all, with the exception of four or five acres in the northwest quarter (N. W. $\frac{1}{4}$) thereof, high, dry and fit for cultivation.

10th. That founded on said affidavits corroborated as aforesaid, on the 26th day of August, 1884, the plaintiff duly appealed from the rejection of his said application to enter said lands as a homestead by the said local land officers unto the Commissioner of the General Land Office. That said appeal with said affidavits was by said local land officers, on the 26th day of August, 1884, duly transmitted to the Commissioner of the General Land Office, and was by him duly received and filed on or about the 1st of September, 1884.

11th. That on the 23d day of January, 1885, while the plaintiff's said appeal from the rejection of his said application to enter said lands as a homestead, and his said contest against the claim of the State of Minnesota to said lands as swamp lands, were pending and undetermined in the General Land Office, the said lands were, through mistake and inadvertence, patented to the State of Minnesota.

12th. That when the plaintiff commenced his residence on said lands, he erected thereon a good and substantial dwelling-house, and continued to reside therein until the summer of 1886, when
57 the same was destroyed by fire. That he immediately thereafter erected and constructed another dwelling-house on said lands, in which ever since said time he has continued to reside and now resides.

13th. That the plaintiff the first year he was on said land cleared and cultivated to crop about an acre and a half of said lands. That the next two succeeding years he cleared and cultivated, about four acres more of said land, and that each year since said time he has cultivated to crop all the land cleared by him as aforesaid.

14th. That said lands were not at the time of the passage of the act of March 12th, 1860, nor were they ever, nor are they now, swamp, wet, or overflowed, or unfit for cultivation; but on the contrary the same were, during all of said time, and now are, with the exception of four or five acres in the northwest corner thereof, high, dry and fit for cultivation.

15th. That on the 2d day of March, 1889, the State of Minnesota, by a deed of conveyance bearing date on that day, conveyed unto the St. Paul & Duluth Railroad Company the south one-half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

16th. That on the 21st day of March, 1889, the said St. Paul & Duluth Railroad Company by warranty deed, conveyed unto John Megins the said south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

17th. That on the 23d of March, 1889, the said John Megins by special warranty deed, conveyed unto Moses D. Kenyon an undivided one-half ($\frac{1}{2}$) of said south half (S. $\frac{1}{2}$) of the northwest (N. W. $\frac{1}{4}$) of said section three (3).

58 18th. That on the 25th day of March, 1891, the said Moses D. Kenyon and Ida H. Kenyon, his wife, by special warranty deed, conveyed unto defendant John Megins an undivided one-quarter ($\frac{1}{4}$) of the south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of said section three (3).

19th. That on the 5th day of January, 1891, the State of Minnesota, by deed of conveyance of that date, conveyed unto the Duluth & Iron Range Railroad Company the north one-half of the northwest quarter (N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$) of said section three (3).

20th. That each and all of said defendants, when they respectively took the conveyance of said lands as aforesaid, did so with notice of the plaintiff's right, claim and interest in and to said lands.

As conclusions of law I find:

1st. That the plaintiff by his settlement, residence and improvements upon said lands, and his said application to enter the same as a homestead, and his appeal from the rejection thereof, and his said contest of the claim of the State of Minnesota thereto, acquired a right to be preferred in the acquisition of said lands from the United States, and that he is the equitable owner of said lands, to wit, the northwest quarter (N. W. $\frac{1}{4}$) of section number three (3), in township sixty-one (61) north of range number fifteen (15) west of the fourth P. M.; and

2d. That judgment should be entered establishing and decreeing him to be the equitable owner of all of said lands, and that
59 the defendants and all persons claiming by, through or under them, or *or* either of them, be forever barred and precluded from having or claiming any right, title, lien or interest in or to the said lands or any part thereof adverse to the plaintiff; and

3d. That plaintiff have judgment against defendants for his costs and disbursements herein.

Let judgment be entered accordingly.

By the court:

J. D. ENSIGN,
District Judge.

Dated Sept. 4, 1896.

Filed in my office at — o'clock — m., Sept. 4, 1896.

JOHN OWENS,
Clerk of District Court,
By W. J. WEST, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss:

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and }
Moses D. Kenyon, Defendants. }

Judgment-roll.

The above-entitled action having been duly entered upon the calendar of said court for the regular May A. D. 1895 term thereof, and having been duly and regularly reached in its order, and coming on for trial, the plaintiff appearing by his attorneys, Jno. Jenswold, Jr., and John Brennan, and the defendant The Duluth & Iron Range Railroad Company by its attorneys, Draper, Davis & Hollister, and the defendants Megins and Kenyon by their attorney, W. B. Phelps, and the said parties having submitted the evidence in support of their respective claims, and the cause having been duly argued and finally submitted by the above-named parties, and the court being fully advised in the premises, and having made and filed herein its findings of facts and conclusions of law, and order for judgment and decree herein:

Now, pursuant to the said findings and order for judgment and decree, and on motion of Jno. Jenswold, Jr., attorney for the plaintiff, it is hereby

Ordered, adjudged and decreed, that the plaintiff, Joseph Roy, is the equitable owner of the lands in controversy, to wit: the north-west quarter (N. W. 4) of section No. three (3), in township No. sixty-one (61), north of range No. fifteen (15), west of the fourth P. M.; and the defendants, The Duluth & Iron Range Railroad Company, John Megins and Moses D. Kenyon, and all persons claiming by, through, or under them, or either of them, be and they are hereby forever barred and precluded from having or claiming any right, title, lien or interest in or to the said lands, or any part thereof, adverse to the plaintiff and parties claiming under him.

It is further ordered and adjudged, that the plaintiff have and recover judgment against the above-named defendants for his costs and disbursements herein, which are taxed at the sum of \$82.39.

Witness the Honorable J. D. Ensign, one of the judges of the district court aforesaid, at Duluth, Minnesota, this 25th day of September, A. D. 1896.

[SEAL.]

JOHN OWENS, Clerk,
By J. S. MOODY, Deputy.

Filed in my office at — o'clock — m., September 25, 1896.

[SEAL.]

JOHN OWENS,
Clerk of District Court,
By J. S. MOODY, Deputy.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and }
Moses D. Kenyon, Defendants. }

To John Jenswold, Jr., attorney for the above-named plaintiff, and to W. B. Phelps, attorney for the above-named defendants, John Megins and Moses D. Kenyon, and to John Owens, clerk of said district court :

Please take notice that the above-named defendant Duluth & Iron Range Railroad Company appeals to the supreme court of the State of Minnesota, from judgment of the said district court entered herein on the 25th day of September, A. D. 1896, and from the whole thereof.

Dated this 2d day of March, A. D. 1897.

DRAPER, DAVIS & HOLLISTER,

*Attorneys for the Defendant Duluth & Iron Range
Railroad Company.*

62 Due service of the within notice of appeal, by copy, is hereby admitted at Duluth, Minn., this 3d day of March, 1897.

JNO. JENSWOLD, Jr.,
Attorney for Plaintiff.

WM. B. PHELPS,

Attorney for Defendants John Megins and Moses D. Kenyon.

JOHN OWENS,

Clerk of the District Court of St. Louis County, Minn.,

By W. J. WEST, *Deputy.*

Filed in my office at — o'clock — m., March 6th, 1897.

JOHN OWENS,

Clerk of District Court,

By W. A. KENNEDY, *Deputy.*

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and }
Moses D. Kenyon, Defendants. }

Whereas the Duluth & Iron Range Railroad Company, one of the defendants in the above-entitled action, appeals to the supreme court of the State of Minnesota from the judgment made and entered herein on the 25th day of September, 1896 :

Now, therefore, we, B. P. Crane and J. L. Greatsinger, both
 63 residing at Duluth, St. Louis Co., Minn., do undertake, promise and agree to and with said Joseph Roy, plaintiff, that said Duluth & Iron Range Railroad Company shall pay all costs and charges that may be awarded against it on such appeal. Conditioned, however, that our liability hereunder shall not exceed the sum of two hundred fifty dollars.

Dated this second day of March, 1897.

B. P. CRANE. [SEAL.]
 J. L. GREATSINGER. [SEAL.]

Signed, sealed and delivered in presence of—

J. H. GRUBER.

H. J. GRANNIS.

STATE OF MINNESOTA,)
 County of St. Louis,) ss :

Be it known, that on this 2d day of March, A. D. 1897, before me, a notary public within and for said county, personally appeared B. P. Crane and J. L. Greatsinger, to me known to be the same persons described in and who executed the foregoing undertaking, and each for himself acknowledged the same to be his own free act and deed.

[NOTARIAL SEAL.] H. J. GRANNIS,
 Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA,)
 County of St. Louis,) ss :

B. P. Crane and J. L. Greatsinger, the persons named in and who executed the foregoing undertaking, being first duly sworn, doth, each for himself, depose and say, that he is a resident and freeholder
 64 of the State of Minnesota, and worth the amount of five hundred dollars above his debts and liabilities, and exclusive of his property exempt from execution.

B. P. CRANE.
 J. L. GREATSINGER.

Subscribed and sworn to before me, this 2d day of March, 1897.

[NOTARIAL SEAL.] H. J. GRANNIS,
 Notary Public, St. Louis Co., Minn.

Due service of the within undertaking by copy is hereby admitted, at Duluth, Minn., this 3d day of March, 1897.

JNO. JENSWOLD, JR.,
 Attorney for Plaintiff.

WM. B. PHELPS,
 Attorney for Defendants John Megins and Moses D. Kenyon.

The within undertaking and the sureties therein are hereby approved this 3d day of March, 1897.

J. D. ENSIGN,
 District Judge.

Filed in my office at — o'clock, — m., March 6, 1897.

JOHN OWENS,

Clerk of District Court,

By W. A. KENNEDY, *Deputy.*

65 STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

You will please take notice: That the above-named defendants, John Megins and Moses D. Kenyon, appeal to the supreme court of the State of Minnesota from the judgment of this court in this action entered on the 25th day of September, 1896, and from the whole thereof.

Dated March 20, 1897.

WM. B. PHELPS,

Attorney for Defendants Megins and Kenyon.

To John Jenswold, Jr., attorney for plaintiff, and John Owens, Esq., clerk of the district court aforesaid.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

JOSEPH ROY, Plaintiff,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS, and
Moses D. Kenyon, Defendants. }

Whereas, the above-named defendants, John Megins and Moses D. Kenyon, have appealed to the supreme court of the State of Minnesota from the judgment of the district court aforesaid, duly
66 entered on the 25th day of September, 1896, in favor of plaintiff and against the defendants :

Now, therefore, we Kenneth Clark and G. H. Prince, residents of the city of St. Paul, county of Ramsey and State of Minnesota, do undertake, promise and agree with said respondent (the plaintiff aforesaid) that the appellants, John Megins and Moses D. Kenyon shall and will pay all costs and charges which may be awarded against them on said appeal, not exceeding the sum of two hundred and fifty dollars.

Dated this 20th day of March, 1897.

KENNETH CLARK.

G. H. PRINCE.

[SEAL.]
[SEAL.]

Signed, sealed and delivered in presence of—

J. C. NETHAWAY.

W. N. SCHOFF.

STATE OF MINNESOTA, }
County of Ramsey, } ss :

On this 22d day of March A. D. 1897, before me personally appeared Kenneth Clark and G. H. Prince, to me known to be the same persons described in and who executed the foregoing undertaking, and each for himself acknowledged the same to be his free act and deed.

[NOTARIAL SEAL.] W. N. SCHOFF,
Notary Public, Ramsey County, Minn.

67 STATE OF MINNESOTA, }
County of Ramsey, } ss :

Kenneth Clark and G. H. Prince the persons named in and who signed the foregoing undertaking, being first duly sworn, doth each for himself depose and say, that he is a resident and freeholder of of the State of Minnesota and worth the sum of five hundred dollars above his debts and liabilities, and exclusive of his property exempt from execution.

KENNETH CLARK.
G. H. PRINCE.

Subscribed and sworn to before me this 22d day of March, 1897.

[NOTARIAL SEAL.] W. N. SCHOFF,
Notary Public, Ramsey County, Minn.

Due service of the within notice of appeal and undertaking on appeal, as approved by the court by copy, is hereby admitted at Duluth, Minn., this 23d day of March, 1897.

JNO. JENSWOLD, JR.,
Attorney for Plaintiff.

JOHN OWENS,
Clerk of District Court,
By W. J. WEST, Deputy.

The within undertaking and the sureties therein are hereby approved this 23d day of March, 1897.

J. D. ENSIGN,
District Judge.

Filed in my office at — o'clock — m. March 23, 1897.

JOHN OWENS,
Clerk of District Court,
By W. J. WEST, Deputy.

68 Clerk's Certificate.

STATE OF MINNESOTA, }
County of St. Louis, } ss :

District Court, Eleventh Judicial District.

I, John Owens, clerk of the district court, St Louis county, and State of Minnesota, do hereby certify, that I have compared the

foregoing papers-writing with the original summons, with sheriff's returns, complaint, answer of D. & I. R. R. Co., answer of John Megins, reply to answer of D. & I. R. R. Co., reply to answer of John Megins, notice and amended reply, notice and amended reply, demurrer to amended reply, order overruling demurrer, notice of filing order, motion and affidavit to make Moses D. Kenyon party defendant, order and affidavit of service, answer of M. D. Kenyon, stipulation as to reply to answer of M. D. Kenyon, findings of fact and conclusions of law, judgment, notice of appeal, undertaking on appeal and notice of appeal and undertaking on appeal, in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original papers and the whole thereof.

Witness my hand and seal of said court, at Duluth, this 5th day of April, A. D. 1897.

[SEAL.]

JOHN OWENS,
Clerk of District Court,
By H. C. WEDMARK,
Deputy Clerk.

69

EXHIBIT "C."

10642-10643.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1897.

JOSEPH ROY, Respondent,	}	Nos. 62 & 81.
<i>vs.</i>		
DULUTH & IRON RANGE R. R. Co., Appellant.		

JOSEPH ROY, Respondent,	}
<i>vs.</i>	
DULUTH & IRON RANGE R. R. Co., Defendants;	}
John Megins <i>et al.</i> , Appellants.	

Syllabus.

The plaintiff, a qualified homesteader, settled upon a quarter section of the public lands as a homesteader, and duly made application to enter the same, tendering the fees therefor.

There was no adverse claim to the land except a pretended claim of the State that it was swamp land, but in fact it never was such. His application was refused by the local land office on the ground that the land inured to the State under the act of March 12th, 1860, and he appealed from such decision and duly instituted a contest with the State. While his appeal and contest were pending and undetermined in the Land Department, a patent for the land was by mistake and inadvertence issued to the State, and thereafter the State conveyed the land to the defendants, who then had notice of the rights of the plaintiff thereto. He has resided on the land as his home ever since his entry, and has performed or tendered per-

formance of all acts necessary under the homestead laws to complete his title; held, that he is, as against the defendants, the equitable owner of the land and entitled to judgment barring them from asserting any title to the land adverse to him. Judgment affirmed.

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10642-10643.

STATE OF MINNESOTA:

Supreme Court, Oct. Term, A. D. 1897.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE R. R. Co., Appellant. } Nos. 62 & 81.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE R. R. Co., Defendants; }
John Megins *et al.*, Appellants.*Opinion.*

Action to determine adverse claim to real estate. Judgment for the plaintiff, from which defendant-appealed.

The unquestioned facts of this case, as found by the trial court, are these: The plaintiff, a qualified homesteader under the laws of the United States relating to homesteads, in good faith and with the *bona fide* intention of acquiring title thereto under such laws, settled and established his residence on the quarter section of land described in the complaint herein. He has ever since maintained a dwelling-house thereon, improved and cultivated the land, and been in actual and exclusive possession thereof. At the time he so entered and settled upon the land a plat of the survey of the township in which it was situated had not been filed in the local land office at the city of Duluth, the office for the land district within which the land in question is situated. On July 2nd, 1883, and after the filing of such plat, the plaintiff went to the proper local land office for the purpose of entering the land as a homestead pursuant to his settlement thereon, and requested the proper officers to make such entry; whereupon they informed him that a mistake had been made in the survey and

71 protests had been filed against it, and that it was unnecessary for him to then file on the land, and advised him not to do so until the protests were determined. The plaintiff, being ignorant of the laws, rules, and regulations relating to the disposition of the public lands, relied upon such representations and acted upon such advice, and returned to his home and continued to occupy and improve the land without then filing upon it. The land never was swamp, wet, overflowed, or unfit for cultivation, but the whole thereof was at the time of the passage of the swamp land grant act of March 12th, 1860, high, dry, and fit for cultivation, except four

or five acres thereof. On August 5th, 1884, the plaintiff learned that his land was claimed by the State of Minnesota as swamp land, and thereupon and on the same day he duly made application to enter the same as a homestead and tendered the fee for making such entry to the proper local land officers. There was then no adverse claim to the land, except the pretended claim of the State to it as swamp land. The land officers refused plaintiff's application to enter the land, on the ground that it inured to the State under the act of March 12th, 1860, and his application was not made within three months after the filing of the township plat in the local land office. On the next day the plaintiff duly filed in such land office his affidavit of contest against the claim of the State, duly corroborated by two witnesses, to the effect that the land was not swamp or overflowed land and unfit for cultivation, but that the whole thereof was high, dry, and fit for cultivation, except four or five acres thereof. On Aug. 26th, 1884, he appealed to the Commissioner of the General Land Office from the rejection of the local land officers of his application to so enter the land; which appeal with the affidavits were on the same day transmitted
 72 by the local officers to such Commissioner and were duly filed by him on September 1st, 1884.

On January 23rd, 1885, while the plaintiff's appeal from the rejection of his application to enter the lands as a homestead and his contest with the State as to its claim that the land was swamp land were pending and undetermined in the General Land Office, the land was through mistake and inadvertence patented to the State. The State by its deeds dated March 2nd, 1889, and January 5th, 1891, respectively, conveyed the land to the defendant Duluth and Iron Range Railroad Co., which by warranty deed thereafter conveyed to the defendant Megins the south half of the quarter section, who conveyed an undivided half of the same to the defendant Kenyon. Each and all of the defendants when they respectively took their conveyances of the land did so with notice of plaintiff's right, claim, and interest therein.

As a conclusion of law the trial court directed judgment for the plaintiff, establishing and decreeing him to be the equitable owner of the whole quarter section, and that the defendants and all persons claiming by or under them or either of them be forever barred from having or claiming any right to the land adverse to the plaintiff.

Do the facts found justify this legal conclusion? This general question is the only one which the record presents for our consideration. The defendants claim that it must be answered in the negative. In support of the claim they urge:

1. That the plaintiff, by settling on the land as a homestead and offering to file thereon and the other proceedings taken and acts done by him as disclosed by the findings, did not acquire any equitable interest in the land, nor place himself in a position to attack the title of the State and its grantees; that he has not entered the land nor paid for it, and that there was no privity between him and the United States when the latter patented the land
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to the State, but he was a stranger to the title; hence his only remedy is by an action by the United States to cancel the patent, and when that is done prosecute his appeal in the Land Department. It is unnecessary to refer to or review the authorities cited by the defendants in support of this claim, for the Supreme Court of the United States has decided this precise question against them.

Shipley *vs.* Cowan, 91 U. S., 330.

Morrison *vs.* Starlmaker, 104 U. S., 213.

Ard *vs.* Brandon, 156 U. S., 537.

The last case cited was an action of ejectment for the recovery of a certain 80 acres of land which had been patented in 1873 by the U. S. to the Missouri, Kansas & Texas R'y Co., and the latter conveyed it to the plaintiff. The defendant's claim to the land was in effect that he settled on it June, 1866, as a homestead, and in July of the same year made application to the proper local land office to enter the land as a homestead and tendered the fees therefor. This was refused on the ground that the land was within the limits of the railway grant, although at that time the land had not been withdrawn from settlement. This was afterwards done and the land conveyed to the railway company. The defendant continued in possession of the land, cultivating and occupying it as his homestead. The district court of Kansas, where the action originated, gave judgment for the plaintiff, which was affirmed by the supreme court of the State. On writ of error the Supreme Court of the United States reversed the judgment. That court, approving and

74 following Shipley *vs.* Cowan, *supra*, held in effect that the defendant, having done all in his power to secure the land as his homestead and complied or tendered compliance with all the provisions of the homestead law necessary to complete his title to the land, and having failed to acquire the legal title through no fault of his own, but through the wrongful action of the land officers, he had a prior equitable claim to the land superior to the claims of the railway Co. or its grantees, which he might assert against them, although they held the patent title. Now, in the case at bar, if, as the trial court found, this land was not swamp land, it was subject to entry and settlement under the homestead laws of the United States; and if, as the court also found, a patent of the land was issued to the State by the mistake and inadvertence of the Land Department, it follows from the other facts found that the plaintiff, whatever his rights against the United States may or may not have been, is the equitable owner of the land as against the State and its grantees, who hold the naked legal title acquired by reason of such mistake without notice of his equities.

According to the findings of fact in this case, the plaintiff did everything in his power to perfect his title. He in good faith performed or tendered performance of all acts which under the homestead laws were essential to complete his right to the land, and he was only prevented from securing the legal title thereto by the wrong, mistake, and inadvertence of the land officers. Such being the case, it falls within the familiar rule that where a party acquires

with notice the legal title to real estate which of right belongs to another, he holds the title in trust for the rightful or equitable owner, and a court of equity will enforce the trust according to the right of each particular case.

2. The defendants further urge that the Land Department when it issued the patent to the State decided as a question of fact that the land was swamp land, and that this decision cannot be reviewed by this court except on the ground of fraud, error of law, or mistake of fact, and that the finding in this court that the patent was issued through mistake and inadvertence is not sufficient to take the case out of the general rule.

It cannot be doubted that in the administration of the public land system of the U. S. questions of fact, such as whether a certain tract is or is not swamp land, are for the consideration of the Land Department, and its decision thereon final, except in cases of fraud, mistake of fact, or error of law. In cases falling within the exception, its decisions may be reviewed by the courts.

It is contended by the defendants that the finding in this case that the patent was issued by mistake and inadvertence is not sufficient to "warrant the court in setting aside the patent," for there is no finding to the effect that there was any mistake or fraud on the part of the Land Department in finding that the land was not swamp land and not subject to private entry. The trouble with this contention is that there is nothing in the findings of the trial court for it to rest upon. There was no finding, direct or indirect, that the Land Department ever passed, mistakenly or otherwise, upon the question whether the land was swamp or not; on the contrary, the necessary inference from the facts found is that the question never was passed upon by it, and that by mistake and inadvertence it issued the patent without passing upon the question. The clerical act of issuing the patent by inadvertence cannot be regarded as a decision within the rule as to the review by the courts of the decisions of the Land Department. The patent having been issued by mistake, the act was not a decision, but an error. Even if the patent

76 had been deliberately issued while the plaintiff's contest and appeal were pending and undetermined, it would have been either a fraud or an error of law which the courts could review. It does not appear from the findings that when the plaintiff made his first application the State had made any claim to it; but it is expressly found that when he made the second application there was no adverse claim to the land except the pretended claim of the State that the land was swamp land, and that, in fact, the land was all high, dry, and fit for cultivation, except three or four acres, and that when the patent was issued by inadvertence the validity of the claim of the State and the rightfulness of the rejection of his application were pending and undetermined. The findings, taken as a whole, show that the patent was issued through an error of law, mistake and inadvertence on the part of the department, and fully sustain the judgment.

Judgment affirmed.

START, C. J.

[Endorsed:] In supreme ct. Joseph Roy *vs.* Duluth & Iron Range Railroad Co. *et al.* Opinion in sup. ct. of Minnesota. Endorsed: Filed Nov. 5, 1897. D. F. Reese, clerk.

77 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1897.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, Appellant. } No. 62.

Pursuant to an order of court duly made and entered in this cause on the twenty-third day of November, A. D. 1897, it is here and hereby determined and adjudged that the judgment of the court below herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said Duluth & Iron Range Railroad Company, appellant herein, the sum and amount of forty-one and $\frac{2}{100}$ dollars (\$41.25), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 23rd day of November, 1897.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest:

D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute.....	\$25.00
Clerk's fees for making return.....	
Printer's fees.....	6.00
Clerk's fees, supreme court.....	10.00
Filing mandate.....	
Affidavits and acknowledgments.....	.25
Postage.....	
Copying returns for printer.....	
	<hr/>
	\$41.25

[Endorsed:] 10642. State of Minnesota, supreme court. Transcript of judgment. Filed November 23, A. D. 1897. D. F. Reese, clerk. — — —, attorney for —. Page No. —, — book.

STATE OF MINNESOTA, }
Supreme Court, } ss:

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within

copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 23rd day of November, A. D. 1897.

D. F. REESE, *Clerk*.

78 STATE OF MINNESOTA :

Supreme Court, October Term, A. D. 1897.

JOSEPH ROY, Respondent,	}	No. 62. Appeal from District Court, Eleventh Judicial District, County of St. Louis.
<i>vs.</i>		
DULUTH & IRON RANGE RAILROAD Company, Appellant.		

This ~~cause~~ having been duly argued and submitted at the general October term of this court, A. D. 1897, upon the return to the appeal herein :

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below herein appeal from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered November 23rd, A. D. 1897.

[Seal of the Supreme Court, State of Minnesota.]

BY THE COURT.

Attest: D. F. REESE, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk*.

[Endorsed:] No. 10642. State of Minnesota, supreme court. Copy of order for judgment. Filed November 23, A. D. 1897. D. F. Reese, clerk. Entered on page —.

79 STATE OF MINNESOTA :

Supreme Court, General October Term, A. D. 1897.

TUESDAY MORNING, 9.30 O'CLOCK, *October 26th, A. D. 1897.*

Court convened pursuant to adjournment, all the justices being present.

JOSEPH ROY, Respondent,	}	Cal. No. 62. Reg. No. 10642.
<i>vs.</i>		
DULUTH & IRON RANGE RAILROAD Company, Appellant.		

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest :

D. F. REESE, *Clerk*.

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest:

D. F. REESE, *Clerk*.

[Endorsed:] 10642. State of Minnesota, supreme court. Copy of minutes of argument. Filed November 23, A. D. 1897. D. F. Reese, clerk.

80 [Endorsed:] No. 10643. State of Minnesota, supreme court. Joseph Roy, respondent, against Duluth & Iron Range Railroad Company, appellant. Judgment roll. Filed November 23rd, 1897. D. F. Reese, clerk.

81 STATE OF MINNESOTA:

Supreme Court.

JOSEPH ROY, Respondent,

vs.

DULUTH & IRON RANGE RAILROAD COMPANY, JOHN MEGINS,
and Moses D. Kenyon, Appellants.

STATE OF MINNESOTA,)
County of St. Louis,) ss:

W. J. Bates, being first duly sworn, says: I reside in the said county of St. Louis and State of Minnesota. I have been on and am personally acquainted with the land comprising the northwest quarter of section three (3), township sixty one (61) north, range fifteen (15) west, of the fourth principal meridian, being situated in said county and State, and I know the value thereof. The value of said lands does not exceed the sum of twenty-five hundred dollars (\$2,500.00); said land is vacant and unoccupied, except that there is a small one-story frame shanty, the value of which shanty is less than fifty dollars (\$50.00); said land and every part thereof is wholly unfenced. The timber on the whole of said land is of the value of less than five hundred dollars (\$500.00).

I have had ten years' experience as a land explorer and timber estimator in said county of St. Louis.

W. J. BATES.

Subscribed and sworn to before me this 2nd day of December, A. D. 1897.

[Notarial Seal, St. Louis Co., Minn.]

THOS. J. DAVIS,

Notary Public, St. Louis Co., Minn.

82 [Endorsed:] 10643. Original. State of Minnesota, supreme court. Joseph Roy, respondent, *vs.* The Duluth & Iron Range Railroad Company, John Megins, and Moses D. Kenyon, appellants. Affidavit. Draper, Davis & Hollister, 400-406 First Nat'l Bank building, Duluth, Minn., attorneys for appellant Duluth & Iron Range Railroad Company. Filed Dec. 15, 1897. D. F. Reese, clerk.

83 Supreme Court of the United States.

DULUTH & IRON RANGE RAILROAD COMPANY, Plaintiff in Error, }
 vs. }
 JOSEPH ROY, Defendant in Error.

Assignments of Error.

Now comes said plaintiff in error, on this 4th day of December, 1897, and says that the order and judgment made in said cause affirming the judgment of the district court for the eleventh judicial district, State of Minnesota, is erroneous and against the just rights of plaintiff in error for the following reasons:

1. The facts found do not support the conclusions of law.
2. The court erred in finding, as a conclusion of law from the facts found, that the defendant in error is the equitable owner of the lands in question, to wit, the north half of the lands described in the complaint.
3. The court erred in finding, as a conclusion of law from the facts found, that defendant in error was entitled to judgment declaring him to be the equitable owner of said lands.
4. The court erred in affirming the judgment of the district court for the county of St. Louis for the reasons:

84 *a.* That the legal title to the lands in question, the north half of the land described in the complaint, was vested in plaintiff in error, and there was no finding by said district court that there was any mistake of law or fraud on the part of the General Land Office of the United States or any officer of the United States.

b. The finding by said district court that the patent to the State of Minnesota, through which plaintiff in error acquired legal title, was issued through a mistake and inadvertence does not constitute any ground for adjudging the defendant in error the equitable owner of the land and entitled to judgment.

c. That defendant in error is not the real party in interest and never had any legal or equitable interest in the land, the United States being the only party which could question or attack the action of the officers of the General Land Office of the United States in issuing the patent to the State of Minnesota or invoke the action of the courts in determining its validity or to set it aside.

Wherefore said plaintiff in error prays that said order and judgment of the supreme court of the State of Minnesota be reversed and said court be directed to enter a judgment in said cause reversing the judgment of the district court of the eleventh judicial district, St. Louis county, State of Minnesota, and dismissing the bill of complaint of said defendant in error.

JAMES K. REDINGTON,
 DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff in Error.

85 [Endorsed:] Original. Supreme Court of the United States. Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error. Assignments of error of plaintiff in error. Draper, Davis & Hollister, 400-406 First National Bank building, Duluth, Minnesota, attorneys for plaintiff in error.

86 STATE OF MINNESOTA :

In Supreme Court.

I, Darius F. Reese, clerk of the supreme court for the State of Minnesota, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the *following* pages, numbered from 1 to 86, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error, including plaintiff in error's assignments of error, prayer for reversal, citation to the adverse party, and the opinion of the court, delivered by Chief Justice Start, affirming the judgment of the district court for the eleventh judicial district, St. Louis county, Minnesota, in said cause, as the same remain of record and on file in this office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of St. Paul, in the State of Minnesota, this 16th day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[Seal of the Supreme Court, State of Minnesota.]

DARIUS F. REESE, *Clerk*.

[Endorsed:] Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy, defendant in error.

Endorsed on cover: Case No. 16,764. Minnesota, supreme court. Term No., 221. Duluth & Iron Range Railroad Company, plaintiff in error, vs. Joseph Roy. Filed December 28th, 1897.